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HON. SALVADOR MENDOZA JR.

7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

9 RAMON TORRES HERNANDEZ,
and FAMILIAS UNIDAS POR LA
10 JUSTICIA, AFL-CIO, a labor
organization,

11 Plaintiffs,

12 v.

13 UNITED STATES DEPARTMENT
14 OF LABOR and EUGENE SCALIA,
in his official capacity as United States
15 Secretary of Labor,

16 Defendants.
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No. 1:20-cv-03241-SMJ

BRIEF OF WAFLA AS *AMICUS*
CURIAE IN SUPPORT OF
DEFENDANTS' RESPONSE TO
PLAINTIFFS' REVISED MOTION
FOR PRELIMINARY
INJUNCTION

BRIEF OF WAFLA

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Carranza v. Dovex Fruit Co.,
190 Wn.2d 612, 416 P.3d 1205 (2018).....6

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183 Wn.2d 649, 355 P.3d 258 (2015).....4, 5, 6

1 **I. INTRODUCTION**

2 Amicus curiae wafla appreciates the Court’s permission to submit an amicus
3 brief, and the opportunity to share its experience serving seasonal employers, and its
4 knowledge of the complex pay systems that apply to this specialized type of work.
5

6 **II. STATEMENT OF FACTS**

7 **A. Wafla**

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9 Wafla is a 501(c)(6) nonprofit association whose members consist primarily
10 of agricultural employers. Wafla provides human resources assistance, counseling,
11 services, and advice to members. Declaration of Dan Fazio (“Fazio Decl.”) ¶ 3. One
12 of wafla’s most important HR programs is providing advice to its members
13 concerning the federal H-2A guest worker program. Fazio Decl. ¶ 4. Since 2011,
14 wafla has grown to become one of the largest H-2A service providers in the nation,
15 and Washington State now ranks third in participation in the H-2A program among
16 the 50 states.¹ Fazio Decl. ¶ 5.
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20 The H-2A program is opposed by labor unions, Columbia Legal Services
21 (“CLS”), and other legal services agencies. Their opposition is rooted in a false
22 narrative that intentionally conflates the current H-2A program with the undeniably
23 problematic Bracero program of the 1940s and 1950s, and claims the H-2A program
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26 ¹ ECF No. 1, ¶ 19; ECF No. 14 ¶ 19.

1 somehow displaces U.S. workers with low paid foreign nationals who are treated
2 like slaves. ECF No. 14, ¶ 19. In reality, this is a highly regulated program that
3 imposes strict worker protections with significant penalties for employer violations.
4 Fazio Decl. ¶ 11.

6
7 **B. The H-2A Program in Washington**

8 Farmers and workers benefit from the legal and stable workforce provided
9 under the H-2A program. Workers – foreign and domestic – employed under an H-
10 2A contract receive higher wages, free housing, better working conditions, and more
11 access to assistance than their peers who work for non-H-2A employers. Fazio Decl.
12 ¶ 10.

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14
15 Contrary to the claims of Plaintiffs, employers in Washington would not use
16 the H-2A program if they could obtain a sufficient number of U.S. workers to
17 perform time-sensitive seasonal agricultural work. This is true for one simple and
18 overriding reason—the cost. Fazio Decl. ¶ 11. First, it currently costs approximately
19 \$10,000 per worker to build housing meeting the standards required by Washington
20 State. *Id.* Next, it costs the employer \$1,000 or more per worker each year for the
21 worker to obtain a visa and travel to the U.S. *Id.* Finally, the H-2A employer must
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1 agree to a federal wage—the Adverse Effect Wage Rate (AEWR) that has historically
2 been 15 to 30 percent greater than the applicable state minimum wage.² *Id.*
3

4 **III. ARGUMENT**

5 **A. Pay Practices are Shaped by the Law and the Market.**

6 The United States Department of Labor’s (“DOL”) ETA Handbook 385
7 instructions for the state wage surveys explicitly recognize that “piece rates with [an]
8 earnings guarantee represent a different method of payment from piece rates without
9 earnings guarantees, and should be listed separately.” Handbook 385 at I-141. This
10 is a significant point because nearly every farmer in Washington must pay farm
11 workers at least the state minimum wage.
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14 For Washington farmers that utilize the H-2A program, they must pay the
15 higher of the state minimum wage, federal minimum wage, prevailing wage or
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21 ² In 2019, the Washington state AEWR was \$15.03 per hour, 25 percent greater than
22 the state minimum wage of \$12.00 per hour. In 2020, Washington state dramatically
23 increased its state minimum wage, but the AEWR was still more than 17 percent
24 greater.
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1 AEW. ³ The AEW is generally the highest of these and it functions as a prevailing
2 wage for H-2A. In addition to Washington farmers' general obligation to pay this
3 guaranteed wage, changes in the law and market demand have led to increasing use
4 of pure hourly and/or guaranteed hourly plus a production bonus pay systems.
5

6 First, an increasing demand from retailers for higher quality fruit has forced
7 many employers to switch to hourly rates to protect the quality of their fruit. Use
8 of a piece rate pay system can encourage farm workers to work faster and therefore
9 increase their pay, but the added harvest speed can also result in increased damage
10 to the fruit and injury to the worker. Farmworker Justice and the National
11 Employment Law Project have argued against piece rate pay, stating that "[p]iece
12 rate payment schemes provide an immediate incentive to boost productivity, but that
13 boost comes at the cost of faster and less careful work." Notably, in an *amicus curiae*
14 brief in *Demetrio v. Sakuma Brother's Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258
15 (2015), the advocacy groups acknowledged:
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20 Piece rates are very low – the average Washington farmworker
21 household earns approximately \$17,000 a year meaning that workers
22 must be extremely productive to make a living wage [...]

23 ³ The AEW is set by a federal wage survey which includes wages from all sources
24 – hourly rates, piece rates, and any other bonus. The AEW in Washington is
25 currently the highest in the nation.
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2 ...[p]iece rate payment schemes provide an immediate incentive to
3 boost productivity, but that boost comes at the cost of faster and less
4 careful work. Studies have identified a variety of specific injury and
5 health related risks that are associated with piece rates and show that
6 piece rate work is often time-pressured. Workers feeling the pressure to
7 sustain high levels of effort in order to achieve maximum productivity
8 are discouraged from taking unpaid rest breaks. Piece rates encourage
9 workers to compromise safe work practices in order to maximize their
10 earning potential with low per-unit piece rates.

11 *Demetrio v. Sakuma Brother's Farms, Inc.*, 2015 WL 893142 (Wash.), 2, 4.

12 Second, the Washington State Supreme Court's July 2015 decision in
13 *Demetrio* resulted in an immediate and significant shift to paying workers a
14 guaranteed hourly minimum plus an additional production bonus instead of a piece
15 rate. *Demetrio* upended decades of well-settled understanding by farmers about the
16 state's rest break statute by holding that employers who compensate farm workers
17 on a piece rate basis must also pay those workers separately for rest breaks at their
18 "regular rate of pay." *Demetrio*, 183 Wn.2d at 660-64.

19 Prior to *Demetrio*, wafla and agricultural employers understood, based on
20 Department of Labor and Industry Guidance, that piece rate pay included rest breaks,
21 non-productive time and everything else that went in to picking that piece of fruit.
22 After *Demetrio*, employers had to scramble to reprogram computer pay systems to
23 comply with the added administrative requirement imposed by the new additional
24 hourly pay for rest breaks.
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1 Third, in 2018, the Washington State Supreme Court held that agricultural
2 workers may be paid on a piece rate basis only for the hours in which they are
3 actually engaged in piece rate work. All time spent performing activities outside the
4 scope of the piece rate picking work—like moving ladders or changing fields—had to
5 be paid on a separate hourly basis. *See Carranza v. Dovex Fruit Co.*, 190 Wn.2d
6 612, 626-27, 416 P.3d 1205 (2018).
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8
9 For many agricultural employers, the administrative burdens imposed by
10 *Demetrio* and *Carranza* forced them to implement an hourly compensation system
11 with a possible production bonus. Even in 1981, the ETA Handbook 385 recognized
12 the fundamental difference between a pure piece rate—with no guarantee of hourly
13 earnings—and a piece rate accompanied by an underlying guaranteed hourly wage,
14 and thus requires agencies to survey both the piece rate and hourly guaranteed wage.
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16 Fazio Decl. ¶ 29. This was true in 1981, and it is true in 2021. *Id.*
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19 **B. Plaintiffs’ Baseless Story that wafla Conspired to Manipulate a Six-**
20 **Year-Old Wage Survey is a Red Herring.**

21 Prior to 2015, the Washington Employment Security Department (“ESD”)
22 conducted its Agricultural Wage and Practice survey every other year. The 2013
23 survey exclusively focused on piece rate earnings and did not give employers the
24 option to report hourly wages for the tree fruit harvest. Fazio Decl. ¶ 13. Following
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1 that survey, ESD announced that it would begin conducting the survey annually and
2 in accordance with the ETA Handbook 385. Fazio Decl. ¶ 14.
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4 In May 2015, ESD Manager Cynthia Forland informed wafla that, unlike the
5 prior survey, the 2015 survey would include “hour” in the list of potential units of
6 pay, but would not include hourly plus a piece rate or production bonus in the list of
7 potential units of pay. Fazio Decl. ¶ 16. While wafla urged ESD to promote
8 accuracy by also separately surveying wages based on a piece rate with hourly
9 earnings guarantees, the 2015 survey did **not** enable employers to report both the
10 piece if any, and the applicable hourly wage, as required by Handbook 385. Fazio
11 Decl. ¶ 17, Ex. 1. Instead, employers were restricted to reporting **either**: (1) a piece
12 rate, or (2) an hourly wage (whether that hourly rate was the Washington minimum
13 wage, the federal AEWR, or some other hourly wage). Accordingly, wafla
14 encouraged its members to report their hourly wage because it was the only wage
15 that a worker was guaranteed to earn. *Id.*
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20 Plaintiffs’ distaste for an industry’s market and liability driven pay practices
21 is insufficient to support a sudden motion for injunctive relief or any other legal
22 action. Nearly five years ago, in a May 5, 2016 email to a CLS attorney, DOL
23 explained this to CLS stating that “in situations where a prevailing piece rate has
24 been established and an employer chooses not to offer it, the regulations require that
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1 the employer guarantee the AEWR.” Fazio Decl. ¶ 18, Exs. 2, 3. Plaintiffs’ have
2 long been aware of the fact that DOL cannot force an employer to pay piece rate. *Id.*
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4 Finally, the record must also be set straight regarding the Fall of 2017 ESD
5 wage survey (that Plaintiffs mistakenly refer to as the “2018 survey”). ECF No. 19
6 at 20. The preliminary results of the 2017 survey were first issued to stakeholders
7 in spring 2018. Fazio Decl. ¶ 18. It is important for the Court to accurately
8 understand that during the 2017 survey process, ESD sent stakeholders (including
9 wafla, CLS, and FUJ) a draft of the survey results and solicited comments. Fazio
10 Decl. ¶ 19. Following its review of the results, wafla sent a comment to ESD
11 pointing out certain inaccuracies in the survey for a number of tree fruit varieties. *Id.*
12 Agreeing with wafla, ESD published a briefing paper that was consistent with
13 wafla’s comments, and gave all of the stakeholders one week to respond to its
14 updated survey. *Id.* There were no further responses from any of the stakeholders,
15 so ESD submitted its updated survey results to DOL (as set out in the briefing
16 paper). Fazio Decl. ¶ 20.
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21 Incredibly on July 25, 2018, seventeen days after Suzi Levine was named the
22 Commissioner of ESD, ESD staff asked DOL to reinsert the data that had been
23 removed during the stakeholder process just two months earlier. Fazio Decl. ¶ 21.
24 This unusual request did not comport with Handbook 385. *Id.* For instance, ESD
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1 asked DOL to accept survey results that were nearly 40 percent below the federal
2 threshold. *Id.* There was no notice to stakeholders about this action and no
3 opportunity to comment. *Id.* The 2018 ESD letter to DOL contains incorrect
4 assumptions, unconfirmed data, and unsupported conclusions. Accordingly, DOL
5 declined to make ESD's improper changes. *Id.*

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8 **C. Wafla Prevailed and was Awarded Its Attorney Fees and Costs**
9 **Associated with the Attorney General's Baseless Investigation of**
10 **Columbia Legal Services and Labor Union Claims.**

11 Following their baseless claim that wafla somehow manipulated the 2015
12 survey, attorneys from CLS and the Northwest Justice Project met with the
13 Washington State Attorney General's Office on September 29, 2015. They urged
14 the Attorney General's Office ("AGO") to conduct a criminal and civil investigation
15 of wafla. Fazio Decl. ¶ 23, Ex. 7.

16
17 The AGO began an investigation of wafla in January 2016, which spanned
18 three years. Fazio Decl. ¶ 24. In December 2016, the Douglas County Superior
19 Court granted wafla's petition to set aside a civil investigative demand ("CID")
20 issued by the AGO. Fazio Decl. ¶ 25, Ex. 8. In September 2018, the Court granted
21 wafla's motion for a preliminary injunction against the AGO regarding its
22 investigation into the lawful advice and information wafla provided to its members
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1 about their participation in the 2015 Survey. Fazio Decl. ¶ 26, Ex. 9. A Court of
2 Appeals Commissioner agreed with the Superior Court. Fazio Decl. ¶ 27, Ex. 10.
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4 In September 2019, the AGO formally discontinued its investigation with a
5 finding of no wrongdoing by wafla. Fazio Decl. ¶ 28. Ultimately, this matter ended
6 poorly for the AGO with wafla being awarded a judgment of \$30,452.50 against the
7 AGO for violating the Public Records Act. *Id.*
8

9 IV. CONCLUSION

10 Plaintiffs' Complaint and Motion for Injunction are a misguided attempt to
11 weaponize this Court as a lobby for their own agenda. The accusations levied against
12 wafla are baseless and irrelevant to the Plaintiff's misguided attempts to force DOL
13 to adopt a pay system favored by Plaintiffs. Plaintiffs' quest to eliminate the use of
14 the H-2A program springs from a fundamental misunderstanding of the program and
15 the market dynamics at issue for agricultural workers and employers.
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Dated this 1st day of February 2021.

*Attorneys for Amicus Curiae
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